Supreme Court, U.S.
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08-658 NOV 17 2008

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IN THE

Supreme Court of the United States

PATSY YOUNG,

Petitioner,

v.

RONALD EUGENE REPINE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit affirmed, with one exception, the district court's ruling upholding a bankruptcy court decision awarding damages against Young, a lawyer, for a willful violation of the automatic bankruptcy stay because Young did not insist that a family court judge release from incarceration a father who was delinquent in child support. Liability was imposed pursuant to what was then Title 11, Section 362(h), despite the fact that (a) the debtor had been incarcerated for criminal contempt; and (b) the automatic stay had been terminated, at Young's request, with regard to the child support obligations, which included Young's fees relating to the enforcement of the child support. In a case involving three questions of first impression, the Fifth Circuit also found this to be "appropriate circumstances" for the imposition of punitive damages and refused to apply the clear language of Section 362(h) which appears to allow an award of attorney's fees only as part of the damages claim, not as a fee-shifting mechanism for the prevailing party.

As a result, these questions are presented for review:

(1) whether a debtor incarcerated for criminal contempt can recover actual and punitive damages for a willful violation of the automatic stay;

(2) whether a debtor can recover actual and punitive damages for a willful violation of the

automatic stay when the automatic stay has been terminated, particularly in the face of the debtor's own violation of the terms of the order granting relief from the stay; and

(3) whether Section 362(h) was intended to allow fee-shifting to the prevailing party or only allowed attorneys' fees to only be awarded when proved as an element of actual damages.

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PETITION FOR A WRIT OF CERTIORARI

Patsy Young ("Young") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is officially reported at *Young v. Repine*, 536 F.3d 512 (5th Cir. 2008), and is reproduced at App. A. The decision of the United States District Court for the Southern District of Texas is not officially reported but is reproduced at App. B. The two orders representing the decision of the United States Bankruptcy Court for the Southern District of Texas are not officially reported but are reproduced at App. C-D.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Fifth Circuit's opinion was rendered on July 22, 2008. The Fifth Circuit denied Young's timely filed Petition for Panel Rehearing and Petition for Rehearing En Banc on August 18, 2008. App. E.

STATUTORY PROVISIONS INVOLVED

Title 11 United States Code, Section 362.

Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed

under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, or a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the

> debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . .

(b) The filing of a petition . . . does not operate as a stay—

> (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
>
> (2) under subsection (a) of this section—
>
> . . .
>
> (B) of the collection of alimony, maintenance, or support[1] from property that is not property of the estate;

1. The current version of Section 362 uses the term "domestic support obligation" and has further enhanced the protections of such obligations from the automatic stay.

. . .

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

. . .

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.[2]

STATEMENT OF THE CASE

A Texas family court found Ronald Eugene Repine ("Repine") to be guilty of contempt of court on June 26, 2003 and sentenced him to 180 days for criminal contempt and civil contempt day-to-day thereafter until he paid almost $23,000 in child support arrearage which had accrued over a period of more than eighteen months, as well as $2,026.75 in attorneys fees and costs for the enforcement of the child support, which sums were deemed additional child support. Young was the attorney representing Repine's ex-wife in her efforts to collect the

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2. This provision is now found at subsection(k) of Section 362 and contains additional provisions which are not relevant to the issues in this proceeding.

child support Repine owed her and, in that representation, obtained the order of incarceration.

Five days after he was jailed, Repine filed a Chapter 13 bankruptcy proceeding. After some unsuccessful settlement discussions initiated by Repine, Young, who was becoming uncomfortable about the threats being made by Repine's counsel when his settlement offers were not accepted, required that steps be taken to terminate any provisions of the automatic stay which might exist as to the child support issues.

Although Young did not make the filing herself in the bankruptcy court because she did not practice in those courts, a motion for relief from the stay which specifically addressed the child support and Young's attorney's fees associated with the enforcement was filed at Young's request on September 11, 2003. On that same day, the bankruptcy court signed the Agreed Order Lifting Stay (the "Agreed Order").[3] One of the provisions of the Agreed Order order required Repine to sign a deed conveying his homestead to his ex-wife by September 12, 2003 so that the property could be sold and used to pay some of the obligations owed to his ex-wife and her lawyers. No provision limits the termination of the stay to payment from those sales proceeds, but the last paragraph allows further child support enforcement orders, including orders that may require incarceration if Repine is not complying with his obligations. (*See* App. F)

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3. The Agreed Order is reproduced at App. F.

The Agreed Order was presented to Young and the family court the next day at a hearing seeking Repine's release. Repine's request for release was denied. Young admittedly did not support the release Repine requested, because the deed for the house Repine had agreed to convey to Young's client had not been signed by Repine as the Agreed Order required.

Repine's father died unexpectedly on September 23, 2003. Rather than bringing that to the attention of the family court judge and seeking a furlough in his sentence to address that death in his family, on September 24, 2003, Repine's counsel instead returned to the Bankruptcy Court with a Joint Motion to Enforce Agreed Order Lifting Stay and Request for Additional Relief. Even though Repine had still not complied with the Agreed Order, it was Young, who was not present and who had not even been given notice of the hearing, who was accused of failing to comply with the Agreed Order.

As a result of the ex parte hearing, the bankruptcy judge signed an Order directing Young to appear and "show cause why she should not be held in contempt for violations of the automatic stay under 11 U.S.C. Section 362(a) and (h)". Young did not know the ex parte hearing had even occurred, much less the serious nature of what had been alleged about her in her absence. Based upon her own experience, however, in dealing regularly with contempt issues in the Texas family courts, Young questioned the validity the order directing her to appear in the bankruptcy court to face alleged contempt

charges on the same day she received the a copy of the order. Of particular concern to Young was the fact that she did not receive the Order from a representative of the court, but from her adversary who attempted to hand it to her in the midst of hearings in other matters she was handling in the family court.

When Young failed to appear that afternoon,[4] both because of previously scheduled court commitments and a personal medical emergency, an Order to Arrest asking the United States Marshal to bring Young to the bankruptcy courtroom was issued. Young learned of the Order to Arrest when she received a phone call from the Marshal, that being her first direct contact from any representative of the bankruptcy court. Young surrendered herself, and a hearing was convened on September 29, 2003 for Young's appearance. Considering the reason for the hearing, the bankruptcy judge was apparently convinced that Young had not violated the stay because Young was ordered released immediately at the conclusion of the hearing.

On October 1, 2003, Young filed a Motion to Withdraw from her representation of Repine's ex-wife. Repine has argued that his release after Young withdrew proves Young was violating the stay by preventing his release while she was in the case. Young

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4. Young has readily and repeatedly admitted she was wrong not to appear earlier, despite her skepticism about the informality used to notify her and the impediments to her appearance on such short notice.

has never agreed with that proposition. Since Repine's release occurred long, rather than soon, after Young left the case, the more plausible explanation is that Repine's compliance with the Agreed Order, not Young's departure from the case, led to Repine's release.

Nevertheless, Repine, who blamed Young for the family judge's refusal to release him sooner, filed an action claiming damages against Young for an alleged willful violation of the automatic stay and asking for relief under Section 362(h)[5], despite the fact that Repine was unemployed and had no prospects of employment prior to being incarcerated. After a trial on the issue, emotional injury damages, actual damages based upon a level of income Repine had not received since the year 2000, punitive damages, and attorney's fees were awarded against Young. The amounts awarded against Young were far in excess of Repine's child support arrearage. Repine presented no evidence of any attorneys' fees having been incurred to address Young's actions in the family court or elsewhere. Instead Repine presented evidence concerning only the attorney's fees incurred in his pursuit of this lawsuit. Repine was awarded a fee-shifting attorney's fees award relating to the proceeding itself.

The district court affirmed the bankruptcy court's holding in all respects. The Fifth Circuit vacated the

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5. Although what was then Section 362(h) is now found at Title 11, Section 362(k), it will continue to be referred to herein as Section 362(h).

award of emotional injury damages[6] but otherwise affirmed the lower courts' rulings. The Fifth Circuit also later denied Young's timely filed Petition for Panel Rehearing and Petition for Rehearing En Banc. App. E.

REASONS FOR GRANTING THE PETITION

Although the amount in controversy and the complexity of the legal issues in this case are both far below those usually reviewed by this Court, the frequency with which child support and contempt issues must be addressed in bankruptcy proceedings all across the country, particularly in troubled financial times, justifies this Court's attention to these issues. Moreover, Young does not believe this Court has yet written on the issues this appeal raises concerning the cause of action for a willful violation of the automatic bankruptcy stay, making it all the more important that it do so in this case for the sake of consistency throughout the country. Since the statute itself provides minimal guidance concerning the cause of action, the concern caused by courts across the country creating their own versions of the cause of action for willful violations of the stay, just as Young contends the bankruptcy court in this case did, is a real and valid one.

The importance of these issues in this case is further heightened because the Fifth Circuit has allowed a

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6. This case was the first in which the Fifth Circuit had addressed emotional injury damages in a case involving an allegation of a willful violation of the automatic stay. While the Fifth Circuit reversed the mental anguish damages in this case, it failed to address the issue of whether such damages would ever be recoverable in such an action. (*See* App. A., 16a-18a)

bankruptcy court to turn the important and wide reaching challenge faced in enforcement of child support obligations on its head. The public policy reasons for reviewing this case are, therefore, enormous. A family court can not be certain, based upon the Fifth Circuit's holding in this case, whether its orders and its supervision of child support issues will be respected or thwarted, and perhaps even used as weapons to enrich delinquent parents. The Fifth Circuit, through the holding in this case, has effectively negated the major tool family courts previously had to enforce their support orders.

Likewise, a family law practitioner, based upon the Fifth Circuit's holding in this case, would be foolish to represent a client who is owed child support if the child support debtor files a bankruptcy, as they often do. In the face of the Fifth Circuit's decision, how can an attorney effectively advise a client entitled to child support payments about whether those obligations can be enforced through a criminal contempt sentence? Although all parties and courts in this case seemed to agree that Repine's incarceration, at least while Young was still taking any action in the contempt case, was based upon a criminal contempt sentence. Yet Young was still found to have willfully violated the automatic stay from which criminal contempt is exempted.

And how can an attorney feel comfortable being involved in any proceeding against a debtor when an order lifting the stay does not prevent liability for a willful violation of the stay, even when the debtor violates the very order lifting the stay? Indeed, this holding by the Fifth Circuit has the potential to create both shelter and windfalls for parents all over the country who shirk

their responsibilities to their children, regardless of whether they are unable to pay those obligations or simply choose not to.

Certainly, Young files this Petition recognizing that this Court is asked to review incredibly complex issues involving multi-million dollar disputes, while accepting very few. But Young also files this Petition believing that this case could well be among the most important this Court will be asked to review, if for no other reason than the incredibly large number of lives it would impact. Since a review of this case will not save Young, an attorney whose practice was comprised exclusively of assisting parents collect delinquent child support, it is not filed for selfish reasons. Young no longer accepts new cases and is closing her practice based entirely on this case and the havoc it creates in the collection of child support —something this Court has certainly recognized in the past to be an essential public policy concern.

Indeed, this Court has recognized the difficulties already associated with the collection of delinquent child support obligations. This Court has further confirmed that steps to preserve the rights and obligations associated with child support orders should be addressed through the review of such cases. *See Hicks v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721(1988). Young respectfully suggests that this case merits such a review, because the holding of the Fifth Circuit in this case has exponentially increased the difficulties associated with collecting delinquent child support. In addition to the public policy considerations raised by a result which allows the delinquent child support debtor to force the counsel for his adversary out of the practice of law and to make a profit in doing so, additional compelling concerns raised by this case are discussed more fully below.

I. REVIEW IS NECESSARY TO PRESERVE THE STATUTORY EXEMPTION CONTAINED IN TITLE 11, SECTION 362(b)(1) IN CONNECTION WITH AN INCARCERATION FOR CRIMINAL CONTEMPT.

The Order holding Repine in contempt stated:

> Based on the finding set out above, IT IS ADJUDGED, that Respondent/Obligor, RONALD EUGENE REPINE, is in CONTEMPT OF THIS COURT for each separate violation of the court order described above, and it is ORDERED that punishment for each separate violation is assessed, concurrently, at confinement in the county jail of Harris County, Texas, for a period of 180 days (from the date of commitment until December 22, 2003, unless "good time" credit is awarded by the sheriff, in which case the sheriff shall notify the court in writing.)
>
> As a prerequisite to coercive contempt, the Court further specifically finds that Respondent/Obligor is presently able to pay the child support arrearage. THEREFORE IT IS FURTHER ORDERED that Respondent/Obligor shall continue to be confined from day-to-day in the county jail of Harris County, Texas, after serving the criminal contempt sentence imposed above, until Respondent/Obligor has PURGED himself of contempt of this court by performing each and every one of the following acts . . .

Thus, the lower courts have correctly held in their rulings that on June 26, 2003, the family court ordered Repine incarcerated for criminal contempt because of his failure to pay child support. As stated, Repine has never questioned and no court has ever held that Repine's incarceration was initially anything but a criminal contempt incarceration.

The dispute instead has centered on the duration of that criminal contempt sentence. There was also no disagreement, even from Repine, that the criminal contempt sentence was in force until September 23, 2003. The disagreement was only about whether it continued beyond that date. According to the terms of the contempt order, Repine's criminal contempt sentence was to last 180 days, until December 22, 2003, absent a written notification to the family court of "good time" credit from the sheriff. Young strenuously assets that a "good time" credit was not proven by Repine. In fact, Repine did not ultimately even offer the only evidence he had of an alleged early termination of the criminal contempt sentence based upon a "good time" credit, because it was unauthenticated hearsay. Nevertheless, the Fifth Circuit applied that credit with nothing properly admitted in the record to support it, thereby holding that Repine's criminal contempt sentence ended on September 23, 2003. (App. A, 10a, note 6).

This is critical, because every court reviewing this case has recognized the legal premise that the automatic stay does not apply to criminal contempt. This is also critical because the bankruptcy court assessed its damages only for the period from September 23, 2003 through November 6, 2003, the date on which Repine was ultimately released. Young's position is that the criminal contempt was still in

force when Repine was released. But, even if Repine had proved a shorter criminal contempt sentence, which Young contends he did not, there is still no basis for the award against Young, because Young took no actions after September 23, 2003 in connection with Repine's contempt. Young, having taken no actions after September 23, 2003, can not be guilty of a willful violation of the automatic stay.

II. REVIEW IS NECESSARY TO PRESERVE THE VALIDITY OF TITLE 11, SECTION 362(d).

Most bankruptcy courts liberally grant relief from the automatic stay in child support settings for obvious public policy reasons. *See Carver v. Carver*, 954 F.2d 1573 (11th Cir. 1992). At Young's request, the stay was lifted in this case. The Agreed Order Lifting Stay signed on September 11, 2003 stated:

> "ORDERED that the Automatic Stay under 11 U.S.C. 362 is lifted for the purpose of allowing ELIZABETH ANNE POLLARD-REPINE to exercise her state law rights with respect to Cause No. 2001-14946, *ELIZABETH ANNE POLLARD-REPINE v. RONALD EUGENE REPINE*, pending in the 245th Judicial District Court of Harris County, Texas."

Thus, the Agreed Order signed on September 11, 2003, should have ended any possible suggestion that there was a violation of the stay by Young. That Agreed Order should have obviously prevented any complaints for future acts, and once the stay is lifted, any defect in any previous actions are also cured. *Sikes v. Global Marine, Inc.*, 881 F. 2d 176 (5th Cir. 1989). It is also unclear how Young was expected to know about some alleged

reservation in the modification of the stay or that it supposedly did not relate to all portions of her client's state law remedies when the order makes no such apparent reservations. Since the liability imposed on Young requires a willful violation of the stay, this issue is significant, particularly when Young had asked, as Pollard's counsel in the family court proceeding identified in the Agree Order, that relief from the stay be sought. The Agreed Order, should prevent the recovery against Young and it should certainly prevent this case from being one in which the "appropriate circumstances" exist for imposition of punitive damages.

Apparently even Repine recognized the difficulties he would face if he tried to argue that attempts to recover the actual child support arrearage was not impacted by the lifting of the stay, so his complaints that the stay had been violated appear to have been limited to attempts to collect the portion of the child support obligation represented by Young's fees for the enforcement proceedings. That argument was successful for Repine in the Fifth Circuit, despite the broad language in the Agreed Order which lifted the stay as to the "state law rights" held by Young's client, one of which is the right to have Young's fees paid by directly by Repine rather than having to pay them herself. (App. A, 13a). The Fifth Circuit does not address how Young could possibly be expected to recognize that her fees were not intended to be included in the provisions of the Agreed Order obtained at Young's request.

Although, the Fifth Circuit held that the terms of the Agreed Order limited the payment of the Young's attorney's fees to the proceeds from the sale of the house Repine had been ordered to convey to his ex-wife, the holding failed to address the failure by Repine to honor

the terms of the Agreed Order which would have implemented such a payment through the conveyance of the property. That transfer was not made while Young was still involved in the case.[7] While Young agrees with the premise that an order lifting the stay is limited to its terms, Young did nothing to violate the terms of the Agreed Order, which are quite broad and placed no apparent limitation whatsoever on the remedies available with regard to the "state law rights" associated with the support claims.

Contrary to Repine's argument and the lower courts' holdings, the Agreed Order contained no provisions indicating that the sale of the property to be transferred by Repine was a limitation of the broader paragraph about lifting the stay. But even if there had been such a restriction, the issue of Repine's failure to abide by the terms of the Agreed Order would still need to be addressed. The Fifth Circuit never addresses the last paragraph of the Agreed Order which allowed enforcement if Repine failed to comply. (App. F, 68a-69a). Certainly, just as an order lifting the stay is limited to its terms, those terms contained in an order lifting or otherwise modifying the automatic stay should be something on which a party impacted by the order can rely. Young was entitled to rely on the termination of the automatic stay as set forth in the Agreed Order and to assume it meant what it said.

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7. As previously stated, on October 1, 2003, Young withdrew from the case, but after September 23, 2003, she did nothing with regard to the contempt action against Repine. Repine was released when the deed transferring the property to Young's former client was recorded on November 6, 2003. Thus, Repine was not released immediately upon Young's withdrawal, and the transfer of the property, not Young's withdrawal, is the action directly associated with Repine's release.

In other words, to affirm the portions of the award against Young which it affirmed, the Fifth Circuit had to ignore numerous realities, including Repine's criminal contempt sentence, Repine's unemployed status and even his lack of any employment prospects when he was incarcerated, Young's inaction in the contempt case after September 23, 2003, the termination of the stay which was never reinstated, and Repine's failure to comply with the provisions of the Agreed Order which terminated the stay.

III. REVIEW IS NECESSARY TO RESOLVE THE PARAMETERS OF ATTORNEYS FEES WHICH CAN BE RECOVERED PURSUANT TO TITLE 11, SECTION 362(h)

Had there been a violation of the stay, and had there been damages suffered as a result by Repine, both of which premises Young adamantly denies, the issue of what can be awarded in attorney's fees pursuant to Section 362(h) should still be addressed by this Court. Section 362(h) states that it allows an individual injured by a willful violation of the stay to recover "actual damages, including costs and attorney's fees . . ." Thus, it appears that the statute was not intended to award attorney's fees associated with prosecution of the case , but only those fees proven necessary to compensate for the willful violation of the stay, such as, for example, those fees Repine had incurred in dealing with the family court proceedings. Another example in a different setting might be fees incurred in obtaining the return of a vehicle repossessed in violation of the stay. There is a clear distinction between what Section 362(h) appears to be describing and what Repine was awarded. Repine made no effort to present evidence of any such attorneys' fees damages.

The lack of authority on this question and the conflicting decisions reached when it has been addressed make it particularly important for this Court to address the issue. From the language of Section 362(h), Young respectfully suggests that the fees must be associated with something other than the actual prosecution of the § 362(h) action. The Fifth Circuit acknowledged that this case was the first one in which the issue had been addressed by that court. The Fifth Circuit's decision in this regard differed from decisions which have been reached in other jurisdictions on the same question.

For example, a bankruptcy court in Illinois has determined that actual damages under Section 362(h) is a statutory element of the cause of action, not just a mathematical question to be resolved after liability has been found. *Aiello v. Providian Financial Corporation*, 231 B.R. 693, 713 (N.D. Ill., 1999). Thus, the court in the *Aiello* case determined that the issue of attorney's fees in a Section 362(h) proceeding does not relate to the attorney's fees incurred in pursuing the adversary which seeks to address the alleged willful violation of the stay. Based upon that rationale, which does appear to be in keeping with the language of Section 362(h), the attorney's fees presented by Repine with regard to the pursuit of his adversary proceeding would not be recoverable even if Repine should prevail and recover other damages.

Even authorities relied upon by the bankruptcy court in its Memorandum Opinion which awarded the damages against Young (App. D) seemed to recognize that the type of attorney's fees contemplated by Section

362(h) were not those associated with the adversary itself. *See Whitt v. Philadelphia Housing Authority*, 79 B.R. 611, 616 (E.D. Penn., 1987). The *Whitt* case recognized "costs and attorney's fees, by the terms of 362(h), are allowable only to embellish 'actual damages.'" *Id.* That also seems to be a recognition that the intent of Section 362(h) is to award fees which resulted from an alleged willful violation of the stay, not to award fees to the prevailing party for an action addressing an alleged willful violation. This Court has held that the best evidence of the intent of Congress is the language of the statute. *Negonsott v. Samuels*, 507 U.S. 99, 104, 113 S. Ct. 1119, 122 L. Ed. 2d 457 (1993). The language of 362(h) must be mangled to support the Fifth Circuit's result in this case.

Of course, the general rule is that the parties to a legal action are required to bear the burden of their own litigation costs, absent a statute which provides otherwise. *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 415 (1978). 42 U.S.C. § 1988(b) and 42 U.S.C.A. § 2000(e) are among the statutes which alter that general rule. The clear language of Section 362(h) does not appear to do that, and a comparison of Section 362(h) with those other statutes supports an apparently different legislative intent.

42 U.S.C.A. § 1988(b), which provides for an award of attorney's fees in civil rights cases, states:

> "(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb

> et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, ***the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs,*** except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction." (emphasis added)

In employment cases, 42 U.S.C.A. § 2000e-5 provides:

> "(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), ***and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title*** . . ." (emphasis added)

Likewise, 42 U.S.C. § 2000e-5(k) provides:

> "(k) Attorney's fee; liability of Commission and United States for costs. In any action or proceeding under this subchapter the court, ***in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs***, and the Commission and the United States shall be liable for costs the same as a private person." (emphasis added)

These other statutes have different language than that found in Section 362(h) which provides:

> "(h) An individual injured by any willful violation of a stay provided by this section ***shall recover actual damages, including costs and attorneys' fees,*** and, in appropriate circumstances, may recover punitive damages." (emphasis added)

Thus, certiorari is warranted to resolve a split between the Fifth Circuit and other decisions as to whether Section 362(h) allows fee shifting to the prevailing party or requires proof of attorneys' fees as an actual element of damages, as the language of Section 362(h) seems to suggest.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JULY 22, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTHCIRCUIT

No. 06-20807

In Re: RONALD EUGENE REPINE,

Debtor.

PATSY YOUNG,

Appellant

v.

RONALD EUGENE REPINE,

Appellee

Appeal from the United States District Court
for the Southern District of Texas.

Before REAVLEY, SMITH and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This is an appeal in a bankruptcy case. Appellant Patsy Young ("Young") appeals from the District Court order affirming the Bankruptcy Court opinion. The

Bankruptcy Court held that Young willfully violated the automatic bankruptcy stay of 11 U.S.C. § 362 and awarded actual and punitive damages along with attorney's fees to the debtor, Appellee Ronald Eugene Repine ("Repine"). We VACATE in part and AFFIRM in part.

I

Young represented Elizabeth Pollard-Repine ("Pollard") in connection with a child support enforcement action against Repine, her former-husband. Liza Greene ("Greene") represented Repine in the child support enforcement action. From January 2000 through June 2003, Repine typically earned between $60,000 and $147,000 for a full year's employment with the high point being $147,000 in 2000 and the low point being $20,000 sometime thereafter because he was unemployed for some part of 2001 through 2003. In June 2003, the family court held Repine in criminal contempt for failure to pay child support and ordered that he be incarcerated for 180 days, ending in December 2003, subject to earlier release for "good time" credit. Additionally, the family court ordered that Repine thereafter be confined for civil contempt day-to-day until he paid child support arrears of $22,859 plus attorneys fees to Young of $2,027. The family court ordered Repine to pay these amounts to Pollard and to Young in separate money judgments.

On the first day of Repine's incarceration, Pollard filed a child support lien against Repine's property. On

July 1, 2003, while still incarcerated, Repine filed for bankruptcy under Chapter 13 through his bankruptcy attorney ("Mills"). Mills provided Young with notice of the bankruptcy on or before July 22. Pollard, however, was represented in connection with the bankruptcy by another attorney ("McClure"). Pursuant to 11 U.S.C. § 362(a), Repine's filing of a petition for Chapter 13 bankruptcy protection automatically stayed all actions against him, including Pollard's child support enforcement action. Mills specifically informed Young of the stay and warned her that efforts to collect her attorney's fees from Repine would violate the stay.

The bankruptcy stay notwithstanding, in July and August, Pollard and Repine apparently negotiated options for settling the child support enforcement action and securing Repine's release from jail. One option included Repine deeding his home to Pollard who would then sell it and credit the proceeds toward his child support arrears. Young, however, resisted out of concern for collecting her attorney's fees, specifically informing Pollard in a letter dated August 8, 2003:

> I am not willing to sign the Agreed and Unopposed Motion for Suspension of Commitment. If you want to enter into such an Order and if I receive the attorney's fees and costs already awarded to me, I will withdraw from the contempt case in the 245th Judicial District Court and you can sign the Order, *pro se*, that is as your own lawyer.

It is unclear from the record whether Pollard or Young ever signed the motion.

On September 11, the Bankruptcy Court entered an agreed order, lifting the automatic stay "for the purpose of allowing [Pollard] to exercise her state law rights with respect to [the child support enforcement action]" ("Agreed Order"). The Agreed Order also required Repine to deed his home to Pollard. Upon selling the home, the Agreed Order provided that Pollard should extinguish the first lien debt on the home and reimburse herself for all reasonable and necessary repairs to the residence. Thereafter, the Agreed Order provided that Pollard should credit any remaining money to those amounts Repine owed her: first, to all debts and fees relating to the home; and second, to

> all pre-petition and post-petition child support arrears, including all pre-petition interest thereon, and including all attorney's fees due and owing to Patsy Young pursuant to the child support lien filed on June 30, 2003, in the amount of $2,026.75 plus all remaining attorney's fees due and owing to her, . . . , all of which attorneys' fees are deemed additional child support.

To the extent that the proceeds from the sale of the home were insufficient to cover child support, the Agreed Order provided that "those remaining amounts, including reasonable attorneys' fees due and owing to Patsy Young . . . , shall be provided for as Priority Unsecured Claims in [Repine's] Chapter 13 Plan."

Appendix A

On September 12, 2003, in light of the Bankruptcy Court's entry of the Agreed Order, the family court held a hearing on Repine's motion for suspension of commitment. At the hearing,[1] Young opposed Repine's release because she was concerned that her fees would not be paid despite the wishes of her client, Pollard, that Repine be released.[2] Pollard confirmed that she wanted

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1. During the trial on Repine's action against Young, the Bankruptcy Court heard testimony concerning the family court proceedings rather than relying on transcripts.

2. Young testified:

> Q: Do you remember commenting on whether Ms. Pollard Repine wanted Mr. Repine to be released at the hearing?
>
> A: I called Ms. Pollard Repine as a witness, and she did state to the Judge that she would like to see Mr. Repine released.
>
> Q: And did you represent her at that hearing?
>
> A: Yes, I did.
>
> Q: And did you oppose his release?
>
> A: I opposed his release because he had not signed the deed . . .

McClure testified:

> Q: And what position did Young take with the Court, with the Family Court, with respect to the Motion for Suspension of Commitment?
>
> * * *

(Cont'd)

Appendix A

Repine to be released in September 2003.[3] The family

(Cont'd)

A: She was opposed to the release.

Q: Did she tell you why?

A: She believed that this agreed order lifting stay did not take care of her attorney's fees properly.

* * *

Q: Did you tell Ms. Young that Ms. Pollard Repine wanted Mr. Repine out of jail?

A: Prior to the actual hearing, but in the courtroom, Liza Greene and I both told her that.

Q: And what was her response?

A: Her response was that she did not care what her client wanted. She wanted a cashier's check. And she would not let him out if we didn't have the cashier's check there that day for her legal fees.

3. Pollard testified:

Q: Did you tell Ms. Young that [you wanted Repine released from jail]?

A: Yes, I just said I wanted him out to go home.

Q: What'd she tell you?

A: . . . she faxed back saying that if she certified checks, or cashier's check for her monies, that

(Cont'd)

court denied Repine's motion for suspension, however, because he still had not paid child support, and Repine remained in jail.

Two things occurred on September 23: Repine's period of criminal incarceration ended in light of his earning a "good time" credit leaving only his day-to-day incarceration for civil contempt until he paid child support and fees; and Repine's father passed away. In a fax to McClure that same day, Young threatened that she would not "appear in court to submit" an agreed order releasing Repine from jail (despite Pollard's wishes), until she received "a copy of the certified checks" for her attorney's fees, noting that Mills and Greene "can disgorge some of the money they received if necessary." On September 24, Repine and Pollard jointly moved to enforce the Agreed Order in the Bankruptcy Court and for Repine's immediate release from jail to attend his father's funeral. Greene, Mills, and McClure appeared, explained their clients' wishes that Repine be released, and further explained that Young would not agree to Repine's release until she was paid attorney's fees. The Bankruptcy Court ordered Young to appear the next day and show cause why she should not be held in contempt for attempting to collect her attorney's fees in violation of the automatic stay.

(Cont'd)

we would go back to Court, or something like that—along those lines.

Q: She still wanted to get paid?

A: Yes.

Despite being personally served with the order to appear and show cause, Young failed to appear before the Bankruptcy Court, and a warrant was issued for her arrest. The U.S. Marshal's Service took Young into custody. The Bankruptcy Court ordered that Young be released following a hearing in which it admonished Young to cease her efforts to collect attorney's fees from the bankruptcy estate. Nevertheless, Young continued her efforts to collect her pre-petition debt from the bankruptcy estate and continued to refuse to consent to Repine's release from jail to attend his father's funeral.

In October, Young moved to withdraw as Pollard's counsel. The family court substituted McClure as counsel, and shortly thereafter finally entered an agreement between the parties that secured Repine's release. Per the Agreed Order, Repine executed the deed on his home to Pollard on October 10. McClure held the deed until November 6, when Repine finally was released from jail.

In January 2004, Repine filed a complaint against Young in the Bankruptcy Court pursuant to 11 U.S.C. § 362(h)[4] seeking damages and attorney's fees, for Young's willful violation of the automatic stay. Following a two-day trial, the Bankruptcy Court ruled in favor of

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4. Section 362(h) was re-codified into section 362(k) per the Bankruptcy Abuse Prevention Consumer Protection Act of 2005, which post-dates Repine's Chapter 13 petition. Accordingly, we will refer to the current section, section 362(k), as did the District Court.

Repine, awarding: $27,280 in actual damages (including $4,400 for emotional distress); $5,000 in punitive damages; and $33,720 in attorney's fees. Young appealed to the District Court, which affirmed the Bankruptcy Court's order. Young now appeals to this Court.

II

Young raises five arguments on appeal.[5] First, Young contends that the automatic stay did not apply to her actions. Second, Young contends that her actions did not cause any damage to Repine. Third, Young contends that there is no evidence to support an award of damages. Fourth, Young contends that emotional damages are not actual damages and therefore cannot

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5. In addition to her five principal arguments, Young complains of certain "evidentiary issues." First, Young contends that "the refusal of the bankruptcy court to review evidence presented in the family court, as well as the findings of the family judge in control of Repine's incarceration was clear error . . . ." Young's opening brief, however, fails to explain what evidence the Bankruptcy Court refused to consider or which findings of the family judge were clear error. Nor does Young cite any authority to support her position. Because of Young's conclusory briefing, we cannot discern the basis or substance of her argument, if indeed she is making one. Therefore, this evidentiary argument is waived due to inadequate briefing. *See L & A Contracting Co. v. Southern Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir.1994). Young's second evidentiary issue, that the Bankruptcy Court should not have relied on a sheriff's department letter to establish the termination date of Repine's criminal confinement, is waived for substantially the same reasons. *See id.*

be recovered. Finally, Young contends that Repine was not entitled to attorney's fees.

We review the Bankruptcy Court's findings of fact for clear error and its conclusions of law *de novo*, as did the District Court. *In re Pratt*, 524 F.3d 580, 584 (5th Cir.2008). We review a Bankruptcy Court's evidentiary rulings under an abuse of discretion standard. *In re SGSM Acquisition Co., LLC*, 439 F.3d 233, 239 (5th Cir.2006). We likewise review a Bankruptcy Court's decision to award attorney's fees for abuse of discretion. *See Pratt*, 524 F.3d at 580.

A

The first issue is whether Young's actions in attempting to collect her attorney's fees fell within the automatic bankruptcy stay. Young contends that the stay did not apply to her actions because: she was seeking payment from funds which were not property of the estate; the Agreed Order lifting the stay allowed her to pursue her attorney's fees; and Repine was serving a criminal contempt sentence to which the stay did not apply.[6] Repine counters that: Young willfully violated the automatic stay; that she did, in fact, seek payment from the property of the estate; and that the

6. Because we are concerned only with Repine's incarceration for civil contempt, which followed the termination of his incarceration for criminal contempt, we need not address Young's argument that she did not violate the stay because Repine was serving a criminal contempt sentence.

Agreed Order lifting the stay did not allow Young to proceed outside its terms to collect her attorney's fees.

The Bankruptcy Code prohibits a claimant, like Young, from attempting to collect pre-petition claims, like her attorney's fees, from a debtor under the protection of the Bankruptcy Court, like Repine:

> [A] petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of—(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceedings against a debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1). The Bankruptcy Code creates a private right of action for a debtor, like Repine, to bring an action against a person who willfully violates the automatic stay to the injury of the debtor:

> Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(k); *see Pettitt v. Baker*, 876 F.2d 456, 457 (5th Cir.1989).

There are three elements for a claim under Section 362(k): (1) Young must have known of the existence of the stay; (2) Young's acts must have been intentional; and (3) Young's acts must have violated the stay. *In re Chesnut*, 422 F.3d 298, 302 (5th Cir.2005). There can be no serious debate as to the first two factors. Like the defendant in *Chesnut*, Young knew of Repine's bankruptcy filing but nevertheless intentionally continued with her efforts to collect her attorney's fees. *See id.*

As to the third factor, Young contends that her acts did not violate the stay for two reasons: first, because she only attempted to collect fees from property outside the bankruptcy estate; and second, because the Agreed Order lifting the stay authorized her collection efforts. We disagree. Assuming, without deciding, that attempts to collect fees from property outside the estate would not violate the stay, we see nothing in the record establishing that Young's collection efforts were restricted solely to non-estate property. Accordingly, her first reason fails. With respect to Young's second reason, it is clear that the Agreed Order lifted the stay to allow only those collection actions specifically authorized by the Agreed Order's terms. Young's actions, however, clearly went beyond its terms. The Agreed Order lifted the stay to allow Pollard's child support enforcement action to proceed only to the extent that monies sought therein could be recovered through Repine deeding his

home to Pollard and then Pollard selling the home and crediting the proceeds to child support arrears and Young's fees. The Agreed Order thus provided one specific means by which Young could recover her fees outside of the bankruptcy from the sale of the home if any sale proceeds remained after Pollard satisfied certain higher-priority obligations that were enumerated in the Agreed Order. The Agreed Order did not authorize Young to pursue her own collection campaign. Indeed, the Agreed Order specifically provided that if the sales proceeds were insufficient to cover Young's fees, then they "shall be provided for as Priority Unsecured Claims in [Repine's] Chapter 13 Plan." Therefore, under the terms of the Agreed Order, Young's only option was to wait and see if she could collect from the proceeds of the sale of the home. If nothing remained from which to pay her fees, Young's only option was to proceed under the Chapter 13 plan. Young's collection activities were contrary to the plain terms of the Agreed Order. Accordingly, we agree with the lower courts that Young willfully violated the automatic stay. *See id.*

B

The second issue is whether there was a causal connection between Young's actions which violated the stay and the damages suffered by Repine. Young contends that her actions did not cause Repine's injury because she neither caused nor lengthened his

incarceration.[7] Repine counters that Young's refusal to consent to his release, contrary to her client's wishes, delayed his release from jail.

We cannot say that the Bankruptcy Court clearly erred in finding that Repine completed his sentence for criminal contempt on September 23, 2003, the day his father passed away. *See Pratt,* 524 F.3d at 580 (holding that standard of review for findings of fact is clear error). Therefore, Repine was eligible for release from jail on or after September 23, once his day-to-day incarceration for civil contempt terminated. With the Agreed Order in place since September 11, securing Repine's payment of child support arrears and fees, Repine and Young jointly moved for Repine's immediate release from jail to attend his father's funeral. Notwithstanding entry of the Agreed Order and despite her client's wishes, Young, however, refused to appear to submit an agreed order releasing Repine and continued to frustrate joint efforts to release him thereafter. Although we cannot be certain that the court would have entered the agreed release order had Young appeared and consented to it, it is clear from the record before us that Young frustrated the otherwise concerted efforts of the parties and their lawyers to secure Repine's release. Accordingly, we find no clear error in the Bankruptcy Court's determination that Young's actions extended Repine's period of incarceration and prevented him from attending his father's funeral. *See Skipper v. United*

7. Young cites no authority in support of this contention.

States, 1 F.3d 349, 352 (5th Cir.1993) (observing that "causation is an issue of fact" that is reviewed for clear error).

C

The third issue is whether there was evidence supporting a damage award. Young contends that there was no such evidence because Repine offered no evidence of lost wages due to his incarceration. Young also contends that there was no evidence of maliciousness or bad faith, which, according to Young, was required to support the punitive damage award against her. Repine does not directly counter Young's contentions with respect to this issue.

We find no clear error in the Bankruptcy Court's award of lost wages. *See Dial One of the Mid-South, Inc. v. BellSouth Telecomm., Inc.,* 269 F.3d 523, 527 (5th Cir.2001) (affirming damage award under deferential clear error standard). Although the evidence is not overwhelming, Repine testified that he earned up to $147,000 for a full year of employment. The Bankruptcy Court's award is consistent with that amount. *See id.* Cross-examination of Repine cast some doubt upon his annual wages based upon his periods of unemployment, but cross-examination did not establish Repine's average annual wages in recent years, his most recent annual wages, or any other facts that suggest another figure or refute the Bankruptcy Court's determination. Accordingly, we cannot find that the Bankruptcy Court clearly erred in awarding damages consistent with Repine's highest annual salary in recent years. *See id.*

Section 362(k) allows punitive damages "in appropriate circumstances." We never have defined "appropriate circumstances" in this Circuit. The Eighth Circuit has interpreted "appropriate circumstances" as requiring "egregious, intentional misconduct on the violator's part." *In re Knaus*, 889 F.2d 773, 776 (8th Cir.1989). And a District Court within our Circuit has endorsed an "egregious conduct" standard. *See In re Lile*, 161 B.R. 788, 792 (S.D.Tex.1993). We agree that an egregious conduct standard is appropriate. Here, we find Young's violation of the bankruptcy stay to be no less "reckless" or "arrogant" than was the violator's in *Lile*, which justified a punitive damage award. *See id.*[8] Young ignored Mills's warnings that efforts to collect her fees would violate the automatic stay, ignored Pollard's wishes that Repine be released from jail, failed to appear before the Bankruptcy Court despite being ordered to do so, and persisted in her efforts to collect her fees despite the Bankruptcy Court's admonishment that she cease all collection efforts. This conduct was egregious. Accordingly, we find no clear error in the Bankruptcy Court's punitive damage award. *See id.*

D

The fourth issue is whether the Bankruptcy Court's award of damages for Repine's emotional injuries was proper. Young contends that an emotional injury award was improper absent proof of some physical

8. The defendant in *Lile* seized certain property of the estate notwithstanding its knowledge of the bankruptcy.

manifestation of emotional distress, which, according to Young, Repine failed to provide. Repine counters that an emotional injury award is a proper component of actual damages. According to Repine, such an emotional injury award need not be accompanied by some physical manifestation of that injury.

We never have decided whether, or under what circumstances, a bankruptcy court may award emotional injury damages under section 362(k). Nor have any of the District Courts in our Circuit squarely decided this issue. Two of our sisters circuits have, however, addressed the issue. The First Circuit has held that emotional damages qualify as "actual damages" under section 362(k). *See Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir.1999). The Court went on to hold that emotional damage awards under section 362(k) must be supported by "specific information" rather than "generalized assertions" and ultimately upheld the Bankruptcy Court's award because the plaintiff testified about specific changes in his life caused by his emotional distress, including sleeping problems, eating problems, and social anxiety. *See id.* at 270. The Seventh Circuit implicitly endorsed *Fleet Mortg.'s* specificity requirement but went further, holding that emotional injury is not compensable under section 362(k) unless the emotional injury can be linked to some other financial injury. *See Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 880 (7th Cir.2001). In so doing, the Court observed that "the law has always been wary of claims of emotional distress" and that the Bankruptcy Courts are ill-suited to assess such claims. *See id.* at 879-80. We share the

Seventh Circuit's caution in affirming emotional damage awards because emotional damages are easier to manufacture than other types of damages. *See id.*

We agree that, at minimum, Repine was required to set forth "specific information" concerning the damages caused by his emotional distress rather than relying only on "generalized assertions." *See Fleet Mortg.*, 196 F.3d at 269. However, we need not adopt a precise standard for whether, or under what circumstances, a court may award emotional damages under section 362(k) because we find that Repine has not made this minimal showing.[9] With respect to his alleged emotional damages, Repine testified that he felt "very upset" at what his sons would think of him for being in jail. He also testified that it was "very traumatic" for him to miss his father's funeral, that he still had dreams about it, that it came to mind when he interacted with people in the community who knew he missed the funeral, and that he may never get over it. We do not doubt Repine's testimony, but these generalized assertions are insufficient to support an emotional damages award under section 362(k). *See Fleet Mortg.*, 196 F.3d at 269. And the fact that Repine's emotional injury was accompanied by financial loss cannot cure this deficiency. *See Aiello*, 239 F.3d at 880. Accordingly, we vacate the Bankruptcy Court's emotional damages award.

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9. We acknowledge Young's argument that in some cases we have required a physical manifestation of emotional injury before affirming a damage award. However, we reach no conclusion as to whether such a physical manifestation is required under section 362(k).

Appendix A

E

The final issue is whether the Bankruptcy Court's award of attorney's fees to Repine was proper. Young does not contend that the amount of attorney's fees was unreasonable. She contends only that "it appears" the fee award itself was erroneous because it awarded fees for Repine's prosecution of the section 362(k) action, whereas a fee award under section 362(k) may include only fees that are a component of actual damages and thus separate from the fees associated with the section 362(k) action itself. In addition, Young contends that the fee award was improper because there is no evidence that Repine actually paid his own fees. Repine counters that the text of section 362(k) plainly provides for an award of attorney's fees to an individual, like himself, who was injured as a result of a willful violation of the automatic stay. According to Repine, the statute bears no further qualification.

We have yet to consider a challenge to the propriety of a fee award under section 362(k). The lower courts in our Circuit have concluded that it is proper to award attorney's fees that were incurred prosecuting a section 362(k) claim. *See Mitchell v. BankIllinois*, 316 B.R. 891, 901-04 (S.D.Tex.2004); *see also In re Still*, 117 B.R. 251, 254-55 (Bankr.E.D.Tex.1990) (holding that debtor could collect attorney's fees incurred in prosecuting a stay violation so long as there were actual damages). We adopt the same reading of section 362(k) and therefore agree. Accordingly, we reject Young's claims that the statute does not provide for a successful claimant to

collect the fees incurred in prosecuting their action. We likewise find no qualification in the statute or our precedents that requires a prevailing party to prove that fees actually have been paid before they can be awarded. Accordingly, we hold that the Bankruptcy Court did not abuse its discretion in awarding fees to Repine as a successful section 362(k) plaintiff.

III

For the foregoing reasons, we VACATE the award of emotional injury damages and AFFIRM the District Court order AFFIRMING the Bankruptcy Court opinion in all other respects.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AUGUST 28, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 05-4349

IN RE: Ronald E. Repine

DEBTOR,

PATSY YOUNG

Appellant,

versus

RONALD E. REPINE

Appellee.

ORDER

Pending before the Court is Appellant Patsy Young's Appeal of Chief United States Bankruptcy Judge Karen Brown's decision in Bankruptcy Case No. 03-39455 (**Instrument No. 5**), filed on March 13, 2006.

I.

Appellant Patsy Young ("Appellant" or "Young") is former counsel for Elizabeth Pollard-Repine ("Pollard-Repine"), ex-wife of Appellee Ronald Repine ("Appellee"

or "Repine"). Appellant represented Pollard-Repine concerning the collection of child support arrearage from Appellee, the payment of which was ordered by a final divorce decree entered in 2001. (Instrument No. 2, Notebook 8, Exhs C-D). On June 26, 2003, the family court ordered Appellee incarcerated until December 22, 2003 for criminal contempt for failure to pay child support. (Instrument No. 2, Notebook 1, Exh 1). Appellee's release was subject to continued confinement for civil contempt until the child support arrearage of $22,858.75 plus Appellant's attorney's fees of $2,026.75 were paid. (*Id.*). Appellee was also eligible for "good time" credit and thus, possible earlier release, notification of which was to be provided in writing to the family court by the sheriff. (*Id.*).

On June 27, 2003, Appellant filed a Notice of Child Support Lien on behalf of Pollard-Repine. (Instrument No. 2, Notebook 7, Exh 3-B). This lien attached to all nonexempt real and personal property of Appellee located in Texas. (*Id.*).

On July 1, 2003, Appellee Repine filed a chapter 13 bankruptcy petition. (Instrument No. 2, Notebook 7, Exh 2). According to testimony[1] by Appellee's bankruptcy counsel, Corey Mills ("Mills"), Mills and Appellant spoke via telephone about the petition within seven to ten days after the filing. (Instrument No. 8, Exh 2 at 103-04). On or about July 14, 2003, Mills and

1. The above-referenced testimony was made during the two-day bankruptcy trial held on May 12-13, 2005, of which this appeal is a result. (Instrument No. 8, Exhs 1-2).

Appellant engaged in settlement discussions as evidenced by a faxed "counter-offer" from Appellant on this date. (Instrument No. 2, Notebook 1, Exh 2). The substance of the counter-offer rejected personal property and payment of the balance of the arrearage offered by Mills, and instead suggested that Appellee deed his total interest in certain residential property to Pollard-Repine, in turn reimbursing her for costs associated with the property as well as attorney's fees for Appellant. (Instrument No. 2, Notebook 1, Exh 2). Appellee's release was conditioned upon the parties entering into an agreed order reflecting the agreement. (*Id.*).

On July 22, 2003, Mills faxed Appellant Young notice of the Suggestion of Bankruptcy. (Instrument No. 2, Notebook 1, Exh 3). In the fax cover letter, Mills reiterated Appellee's rejection of Appellant's counter-offer from July 14. (*Id.*). Mills explained that the home had become property of the bankruptcy estate subject to the automatic stay, and that the situation had turned into a "coercive measure of securing a man's freedom in return for property of the bankruptcy estate." (*Id.*). Mills also explained that because Appellee's disposable income had become subject to payment to the chapter 13 trustee, that no large payment toward the child support arrears was possible. (*Id.*). Mills continued by explaining that the child support arrearage as well as Appellant's attorney's fees would be paid under the chapter 13 plan and that if Appellee was "not released by Thursday, July 24, 2003," he would file a motion for contempt for violation of the automatic stay pursuant to remedies afforded Appellee in 11 U.S.C. § 362(h). (*Id.*).

Appendix B

On July 23, 2003, Mills faxed Appellant Young another letter advising that because Appellant represented Pollard-Repine in the child support collections and because she had issued a written demand for settlement of the claim, that Mills would continue to address his correspondence to Appellant, and not directly to Pollard-Repine. (Instrument No. 2, Notebook 1, Exh 4).

On August 7, 2003, Appellee's family law counsel, Liza Greene ("Greene"), sent a letter to Appellant communicating proposed terms of a settlement that they had discussed that morning. (Instrument No. 2, Notebook 1, Exh 5). The offer included not only Appellee deeding the property to Pollard-Repine, but for Appellant's attorney's fees to be paid in full from funds separate from the bankruptcy estate with money from Appellee's family. (*Id.*). It is the testimony of Appellee's family law counsel that Appellant refused the offer. (Instrument No. 8, Exh 1 at 126-27).[2]

On August 8, 2003, Appellant Young advised her client, Pollard-Repine, that as her counsel she refused to sign an Agreed and Unopposed Motion for Suspension of Commitment which would release Appellee from incarceration. (Instrument No. 2, Notebook 1, Exh 16). Further, Appellant offered to withdraw as Pollard-Repine's counsel after receiving her attorney's fees so that Pollard-Repine could proceed

2. There is a fax attached to family court proceedings dated August 8, 2003 where Appellant rejected the August 7 offer of Appellee. (Instrument No. 2, Notebook 2, Exh 43).

with the Motion *pro se*. (*Id.*). On August 25, 2003, Appellee's family law counsel, Greene, contacted Appellant to serve notice for a hearing on Appellee's motion to suspend his incarceration in the family court. (Instrument No. 2, Notebook 5, Exh 27). Greene also advised Appellant to contact Pollard-Repine's bankruptcy counsel, Margaret McClure ("McClure"), to ensure that the settlement discussions in which they were engaging would not be in violation of the bankruptcy stay. (*Id.*).

On September 5, 2003, Appellee submitted his proposed chapter 13 plan. (Instrument No. 2, Notebook 7, Exh 6).[3] On September 11, 2003, in the bankruptcy court, the parties entered into an Agreed Order Lifting Stay ("Agreed Order") allowing Pollard-Repine to exercise her state law rights in cause no. 2001-14946, the state child support enforcement proceedings. (Instrument No. 2, Notebook 1, Exh 6). McClure represented Pollard-Repine in the bankruptcy court and for the purpose of entering into the Agreed Order. (*Id.*).

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3. Appellant Young was not listed as a creditor in this initial proposed plan, however, the Harris County Child Support Division was. (*Id.*). Appellant was listed as a separate creditor in the First Amended Plan submitted on November 21, 2003 (specifically listed in Schedule E, Creditor Holding Unsecured Priority Claims). (Instrument No. 2, Notebook 7, Exh 13). Appellant's claim was listed as "Admin. Priority;" such a claim is required to be paid in full in deferred cash payments on a monthly basis, pursuant to 11 U.S.C. § 507. (*Id.* at Exh 14). Appellee filed the Second Amended Plan on November 12, 2004. (*Id.* at Exh 20).

The Agreed Order ordered Appellee to execute a deed of his total interest in certain residential property to Pollard-Repine. (*Id.*). The Agreed Order also provided for Pollard-Repine to credit the proceeds of the residence sale to various debts, including attorney's fees due Appellant, pursuant to the child support lien previously filed on June 27, 2003. (*Id.*). The remaining attorney's fees due Young were to be provided for in debtor's chapter 13 plan as "priority unsecured claims." (*Id.*).

On September 12, 2003, the family court held a trial *de novo* pursuant to Appellee's appeal of the court's denial to suspend Appellee's incarceration. (Instrument No. 2, Notebook 5, Exh 18). On September 16, 2003, the family court issued an order denying Appellee's motion. (*Id.*). At the trial, Appellant opposed the motion despite her client's wishes. (Instrument No. 8, Exh 1 at 159). The court based its denial of the motion on the fact that Appellee Repine had not paid anything toward the child support arrearage or the on-going child support from June 26 through September 11, 2003, but that Appellee had paid or arranged to have someone else pay two attorneys to represent Appellee during that time. (Instrument No. 2, Notebook 5, Exh 18).

On September 23, 2003, Appellee's father passed away (Instrument No. 2, Notebook 1, Exh 19), and Appellee's family law counsel obtained a letter from the Harris County sheriff stating that Appellee had received "good time" credit toward his 180-day criminal contempt sentence, and was eligible for release when his civil

contempt sentence was complete.[4] (Instrument No. 2, Notebook 1, Exh 7). In a fax to Pollard-Repine's bankruptcy counsel that same day, Appellant Young conveyed that she would not appear in court to submit an agreed order securing Appellee's immediate release until Appellee's attorney gave Appellant a certified check in payment of attorney's fees. (Instrument No. 2, Notebook 1, Exh 9). Appellant suggested that Appellee's attorneys "disgorge" part of the payments they had received in representing Appellee. (*Id.*). Included with this communication was Appellant's proposed version of the agreed order which, among other things, provided for the payment of Appellant's attorney's fees from money outside of the chapter 13 bankruptcy estate, presumably from Appellee Repine's family as was offered before. (*Id.*). The total amount sought by Appellant in the proposed order included $3,265.76 in attorney's fees incurred from June 27, 2003 through September 12, 2003, which was in addition to the attorney's fees awarded by the family court.[5] (*Id.*). The proposed order included terms stating that Appellant would have received $1,564.75 in attorney's fees from money outside of the bankruptcy estate by the time the order would have been entered. (*Id.*). The proposed order also included a proposed agreement that Appellee Repine

4. This document was not officially entered into evidence during the bankruptcy court proceedings regarding Appellant's willful stay violation. (Instrument No. 8, Exhs 1-2).

5. The proposed order submitted by Appellant to opposing counsel designated these newly incurred fees as additional child support although there is no order from the family court deeming them as such.

not bring an action for contempt for any alleged violation of the bankruptcy stay. (*Id.* at 5, § 9).

On September 24, 2003, Appellee and Pollard-Repine jointly moved to enforce the Agreed Order before the bankruptcy court and for additional relief seeking Appellee's immediate release from incarceration. (Instrument No. 2, Notebook 1, Exh 10). Appellee's family law and bankruptcy attorneys, and Pollard-Repine's bankruptcy attorney all appeared before the court and explained their desire to obtain Appellee's release, but that Appellant Young would not enter into an agreement for Appellee's release before receiving attorney's fees. (*Id.*). The bankruptcy court ordered Appellant to appear the following day and show cause why she should not be held in contempt for violations of the automatic stay. (Instrument No. 5, Notebook 7, Exh 11).[6] Appellant failed to appear at the hearing. (Instrument No. 2, Notebook 7, Exh 12). Appellee's bankruptcy attorney Mills explained to the court that he physically served notice on Appellant but that she refused to take it. Mills further explained that he therefore left the show cause order in Appellant's vicinity. (Instrument No. 2, Notebook 7, Exh 15 at 3-4). The bankruptcy court issued an Order to Arrest Appellant Young on September 25, 2003. (Instrument

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6. During said proceedings, the bankruptcy court expressed its desire to allow Appellant an opportunity to explain the situation, specifically, why she "continu[ed] to assert a prepetition debt, which is resulting in harm to the debtor and therefore harm to the estate and the viability of the bankruptcy case." (Instrument No. 2, Notebook 7, Exh 17 at 14).

No. 2, Notebook 7, Exh 12). On September 29, 2003, the bankruptcy court released Appellant following a hearing in which the court warned Appellant to cease attempting to collect her attorney's fees from property of the estate.[7] (*Id.* at Exh 18 at 18).

On October 1, 2003, Appellant Young filed a motion in family court to withdraw as counsel for Pollard-Repine. (Instrument No. 2, Notebook 1, Exh 11). On October 6, 2003, Appellant filed an amended motion seeking sanctions against Mills, Greene, and McClure. (*Id.* at Exh 15).[8] McClure moved to substitute herself as Pollard-Repine's counsel and the court approved the motion on or around October 7, 2003. (Instrument No. 2, Notebook 1, Exh 13). On October 7, 2003, Appellant filed a motion to set aside the order substituting

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7. Specifically, the court advised Appellant to sign an agreed order to allow Appellee to get out of jail to begin working again. The court recognized that the final decision rested with the family court, but that Appellant should do what she could to "back away" from collecting the debt. (Instrument No. 2, Notebook 7, Exh 18). However, Appellant testified that the bankruptcy court did not "order" her to sign an agreed order and that because there was no order issued with those instructions, she continued to protect her client's interests. (Instrument No. 8, Exh 1 at 167).

8. On March 18, 2004, the family court signed an order requiring Mills, McClure, and Greene to pay $5,000 in monetary sanctions to Young. (Instrument No. 2, Notebook 3, Exh 48-D). That order was subsequently reversed on appeal and judgment rendered that Young take nothing. (Instrument No. 2, Notebook 3, Exh 63).

counsel. (*Id.* at Exh 14). Appellee executed the deed on the property to Pollard-Repine on October 10, 2003.[9] (Instrument No. 2, Notebook 8, Exh 37-K). On October 10, 2003, Greene filed a petition for writ of habeas corpus for Appellee in the Harris County court of appeals. (Instrument No. 2, Notebook 5, Exh 16). The petition was denied on October 16, 2003 because the court found that Appellee had not established that the family court judgment of contempt was void. (*Id.* at Exh 17).

On November 6, 2003, in the family court, Appellee and Pollard-Repine entered into an Agreed Release Order providing for Appellee's immediate release. (Instrument No. 2, Notebook 5, Exh 24). Under the Agreed Release Order, the terms and conditions of the original Agreed Order in which the parties first entered in the bankruptcy court were still in effect. (*Id.*). Also on that day, the state court released Appellee from jail, and Pollard-Repine filed the executed deed in Harris County. (Instrument No. 8, Exh 1 at 74).

On January 13, 2004, Appellee filed a Complaint in the bankruptcy court seeking damages and attorney's fees for Appellant's alleged civil contempt and willful violation of the automatic stay. (Instrument No. 2, Notebook 7, Exh 27). On or about January 29, 2004, Appellant Young then filed a Motion to Dismiss. (*Id.* at Exh 28). On February 8, 2005, the bankruptcy court issued an order denying Appellant's Motion to Dismiss,

9. According to testimony by McClure, she held the deed until November 6 when Appellee was released from jail. (Instrument No. 8, Exh 1 at 74).

(Instrument No. 2, Notebook 3, Exh 48-A) and on March 18, 2005, denied Appellant's Motion to Reconsider. (Instrument No. 2, Notebook 3, Exh 48-B). On or about March 31, 2005, Appellant filed an Emergency Motion for Stay Pending Appeal. (*Id.* at Exh 49). On or about April 13, 2005, Appellee filed his Response. (*Id.* at Exh 50). On April 20, 2005, the bankruptcy court denied Appellant's Motion for Stay Pending Appeal. (*Id.* at Exh 52).

On May 12-13, 2005, the bankruptcy court held a two-day trial on Appellee's Complaint. (Instrument No. 8, Exhs 1-2). On May 26, 2005, Appellant filed a Motion to Dismiss, Alternatively, Objections to 2nd Amended Ch. 13 Plan. (Instrument No. 2, Notebook 7, Exh 23). On June 14, 2005, the bankruptcy court issued the Interim Order confirming the Debtor's Plan and Related Orders. (*Id.* at Exh 24).

On August 12, 2005, the bankruptcy court issued a memorandum opinion finding for Appellee and awarding actual damages, punitive damages, and attorney's fees.[10] (Instrument No. 2, Notebook 3, Exh 63).

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10. The hearing to determine the specific amount of attorney's fees was set for October 3, 2005. (Instrument No. 2, Notebook 3, Exh 63) Appellee Repine submitted a Motion for Attorney's Fees, and Appellant Young objected to the Motion. (*Id.* at Exhs 65-66). The bankruptcy court issued the Order Allowing Attorney's Fees on December 8, 2005, finding that Appellee was entitled to recover $33,179.54 from Appellant. (*Id.* at Exh 68).

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On December 19, 2005, Appellant filed her Notice of Appeal. (Instrument No. 2, Notebook 3, Exh 69). On March 13, 2006, Appellant Young filed a brief in support of her appeal. (Instrument No. 5). Appellant Young argues that the bankruptcy court erred in refusing to review evidence from the family court, and that the bankruptcy court improperly relied on a document not entered into evidence. (*Id.* at 12). Appellant Young argues that the bankruptcy court erred in awarding judgment against Appellant because there was no willful violation of the stay. (*Id.* at 1). Appellant argues that the automatic stay did not apply to her actions because she was seeking to resolve a child support matter from property outside of the estate. (*Id.* at 13). Appellant also argues that there was no evidence presented to the bankruptcy court that Appellant knew the automatic stay to be an issue. (*Id.* at 14). Appellant next contends that the bankruptcy court erred in awarding judgment against Appellant because Appellant did not cause damages to Repine. (*Id.* at 2). Appellant Young states that Appellee Repine's own actions kept him incarcerated and that Appellee took no alternative actions (such as seeking good time credit, or a hardship furlough) to mitigate his damages. (*Id.* at 18). Appellant also argues that the bankruptcy court incorrectly calculated Appellee's lost income because there was no evidence before the court to support such an award. (*Id.* at 19). Appellant further argues that without evidence of a stay violation, especially without evidence of malice or bad faith, the court should not have awarded punitive damages to Appellee. (*Id.* at 20). Appellant Young's last contention states that the bankruptcy court

erred in awarding attorney's fees to Appellee because he paid none. (*Id.* at 2). Appellant argues that pursuant to 11 U.S.C. § 362(h), recoverable attorney's fees, (1) must have actually been paid, and (2) must have resulted from an alleged willful stay violation, not as an award to the prevailing party for an action addressing the alleged willful violation. (*Id.* at 20-21).

On May 1, 2006, Appellee Repine filed his Brief for the present appeal. (Instrument No. 8). Appellee first contends that the bankruptcy court properly awarded judgment against Appellant for willful violation of the automatic stay. (*Id.* at 8). Appellee argues that there is adequate support for the bankruptcy court's findings, and that when adhering to the standard of review, this Court cannot substitute its judgment for that of the trial court even if this Court would decide the case differently. (*Id.* at 8-9). Appellee next contends that the bankruptcy court properly awarded damages against Appellant for willful violation of the automatic stay. (*Id.* at 11). Appellee argues that Appellant's legal challenge to the damage award for emotional distress is unfounded because the ability to recover emotional distress damages as an element of actual damages has been supported by several circuit courts. (*Id.* at 11-12). Appellee Repine finally contends that the bankruptcy court properly awarded attorney's fees associated with the prosecution of the automatic stay violation because such a decision is within the purview of discretion of the bankruptcy court. (*Id.* at 12).

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On May 25, 2006, Appellant Young filed her Reply Brief. (Instrument No. 10). Appellant contends that Appellee was serving a criminal contempt sentence to which the automatic stay did not apply. (*Id.* at 3). Appellant cites case law in arguing that the automatic stay does not apply to criminal contempt. (*Id.* at 4). Appellant argues that in the bankruptcy court's opinion, it improperly relied on an exhibit not admitted into evidence which stated that Appellee's criminal contempt ended on September 23, 2003. (*Id.*). Appellant next contends that Appellee initiated settlement discussions and property of the estate was not sought for Appellant's fees. (*Id.* at 5). Appellant Young explains that in the context of the settlement discussions, it was conveyed to her that her fees would be paid by Appellee's attorney and that the homestead issue entered into those discussions only because Appellant sought to protect Pollard-Repine's interests. (*Id.*). Appellant contends that at her request, the stay had been lifted to allow all state court remedies to proceed, and Appellee was released when he complied with the order. (*Id.* at 6). Appellant argues that according to the terms of the order, there was no limitation placed on the remedies available in the state court. (*Id.* at 7). Appellant contends that there was no evidence presented to the court of any possible source of lost income to Appellee. (*Id.* at 9). Finally, Appellant Young reiterates that the evidence was not sufficient to support the finding of emotional distress, and that attorney's fees are not recoverable either. (*Id.* at 9-10).

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II.

This Court has authority to hear this appeal pursuant to 28 U.S.C. § 158(a) (1990). When reviewing a bankruptcy court's decision, the district court functions as an appellate court and applies the standard of review generally applied in the federal court of appeals. *In Re Webb*, 954 F.2d 1102, 1103-04 (5th Cir. 1992). Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses. *Id.* at 1104. The district court must ascertain whether the evidence supports the findings of the bankruptcy judge and determine whether the district court is "left with the definite and firm conviction that a mistake has been committed." *Id.*, *citing Anderson v. City ofBessemer*, 470 U.S. 564 (1985). Matters of law are reviewed *de novo. Matter of Coston*, 987 F.2d 1096, 1099 (5th Cir. 1992) *aff'd on reh'g*, 991 F.2d 257 (5th Cir. 1993). *De novo* review requires the court to make a judgment independent of the bankruptcy court's, without deference to that court's analysis and conclusions. *In Re England*, 141 B.R. 495, 497 (N.D.Tex. 1991), *aff'd*, 975 F.2d 1168 (5th Cir. 1992). When the bankruptcy court's factual findings are based upon an improper legal conclusion, that factual finding is not accorded the clearly erroneous standard. *Matter of Fabricators, Inc.*, 926 F.2d 1458, 1464 (5th Cir. 1991).

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The bankruptcy court's decision to impose sanctions is discretionary, therefore this Court reviews the exercise of this power for abuse of discretion. *Continental Cas. Co. v. Gullett*, 253 B.R. 796, 803-04 (S.D. Tex. 1999) (*citing In re Bufkin Bros., Inc.*, 757 F.2d 1573, 1577-78 (5th Cir. 1985). The bankruptcy court's award of attorney's fees is reviewed for abuse of discretion. *Mitchell v. Banklllinois (In re Mitchell)*, 316 B.R. 891, 902 (S.D. Tex. 2003).

III.

1.

Section 362 of the Bankruptcy Code imposes an affirmative duty to discontinue post-petition collection actions. Under § 362(a)(1), a bankruptcy petition operates as a stay of:

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

See 11 U.S.C. § 362(a)(1) (2006). Under Section 362(a)(3), the filing of the bankruptcy petition acts as a stay to "any act . . . to exercise control over property of the

estate." *See Mitchell v. Banklllinois (In re Mitchell)*, 316 B.R. 891, 899 (S.D. Tex. 2003). Section 362(a)(6) prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case."

There are three elements to a willful violation claim: (1) the defendant must have known of the existence of the stay; (2) the defendant's acts must have been intentional; and (3) these acts must have violated the stay. *Brown v. Chestnut (In re Chestnut)*, 422 F.3d 298, 302 (5th Cir. 2005). A willful violation occurs when the creditor acts deliberately with knowledge of the bankruptcy petition. *Id.* at 901 (citing *Transouth Fin. Corp. v. Sharon*, 234 B.R. 676, 687 (6th Cir. 1998)). Specific intent is not required to violate the automatic stay; knowledge of the stay suffices for such a claim. *Brown v. Chestnut (In re Chestnut)*, 422 F.3d 298, 302 (5th Cir. 2005) (citing *In re Taylor*, 884 F.2d 478, 482 (9th Cir. 1989). The automatic stay is effective whether or not the creditor has actual notice of the bankruptcy case. *In re Lile*, 103 Bankr. 830 (Bankr. S.D. Tex. 1989). Once the creditor receives actual notice, however, the burden shifts to the creditor to prevent violations of the automatic stay. *Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999); *See Mitchell Constr. Co., Inc. v. Smith (In re Smith)*, 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995).

Sanctions may be imposed under § 362(k) for a willful violation of the automatic stay for maintaining an action and unjustifiably delaying its dismissal after receiving

notice of the bankruptcy petition. *See In re Dyer*, 322 F.3d 1178 (9th Cir. 2003); *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210 (9th Cir. 2002). An order lifting stay is limited to its terms and pursuit of activity beyond the terms of the order is a violation of the stay. *See In re Thornton*, 277 B.R. 719 (Bankr. E.D. Tex. 2002).

Appellant Young's main contention is that the stay did not apply to Appellant's actions because she sought collection of child support from property outside of the bankruptcy estate, pursuant to 11 U.S.C. § 362(b)(2)(B), and therefore the bankruptcy court's finding of a willful stay violation is incorrect. The Court disagrees.

Appellant attempts to shift the focus of this case to the negotiations and settlement discussions between opposing counsel, and to what extent certain proposals violated the automatic stay. However, the appropriate focus is based on the actions of Appellant outside of these discussions. The evidence before the Court shows that Appellant had knowledge of Appellee's bankruptcy petition between July 1, 2003 and July 22, 2003. It is clear that after July 22, 2003, Appellant had knowledge of Appellee Repine's bankruptcy filing, but intentionally continued to seek payment of attorney's fees from Appellee.

Appellant argues that because the stay was lifted on September 11, 2003 pursuant to the Agreed Order, it "should have ended any possible suggestion that there was a violation of the stay by [Appellant]" before September 11. (Instrument No. 5 at 16). Even in

accepting Appellant's contention, the Court still finds that Appellant's actions were intentional, and those actions violated the stay as early as September 12, 2003 when Appellant opposed Appellee's release the following day in family court. (Instrument No. 2, Notebook 5, Exh 13). When a motion to release Appellee was presented to Appellant Young before a hearing on the matter, she refused to sign it. (Instrument No. 8, Exh 1 at 159). Appellant was clear in her correspondence to Pollard-Repine that she would not participate in Appellee's release at all, but if she received the attorney's fees already provided for her in the Agreed Order, that she would withdraw as Pollard-Repine's counsel and allow her client to proceed *pro se. (Id.).* Furthermore, the evidence before the Court shows that as soon as Appellant Young completely withdrew as counsel for Pollard-Repine in family court and an order was entered to allow Margaret McClure to substitute in, that the family court accepted an agreement from the parties to secure Appellee Repine's release from jail. (Instrument No. 8, Exh 1 at 84-85). Appellant Young used her position as counsel for Pollard-Repine in family court to oppose his release, although Appellee Repine had agreed to deed the home to Pollard-Repine as early as August 7, 2003. (Instrument No. 2, Notebook 1, Exh *5). See In re Johnston*, 321 B.R. 262 (D. Ariz. 2005) (debtor's former wife and her attorney were found to have willfully violated the automatic stay by failing to take affirmative action to vacate an order of the family court which required the debtor to pay a large sum or face incarceration).

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Appellant Young also argues that it is nonsensical to find that she violated the stay because she requested the relief sought in the Agreed Order, and that it is not reasonable to conclude that she was not included with Pollard-Repine in seeking her rights to attorney's fees. Appellant argues that there is no evidence that the stay included her, and that the Agreed Order lifting the stay for Pollard-Repine placed no limitations whatsoever on Appellant's actions in state court. However, Appellant ignores the provisions relating specifically to the method of payment of Appellant's attorney's fees. The language of the Agreed Order states:

> (Page 1) It is ordered that the Automatic Stay under 11 U.S.C. § 362 is lifted for the purpose of allowing Elizabeth Anne Pollard-Repine to exercise her state law rights with respect to Cause No. 2001-14946, *Elizabeth Anne Pollard-Repine v. Ronald Eugene Repine*, pending in the 245th Judicial District Court of Harris County, Texas.
>
> (Pages 2-3) It is further ordered that from the sales proceeds, Elizabeth Anne Pollard-Repine shall extinguish the first lien debt to Countrywide Home Loans, Inc. . . . and from the net sales proceeds [Pollard-Repine] shall first reimburse herself for all reasonable and necessary repairs to the residence . . . thereafter from the remaining net sales proceeds, Pollard-Repine shall credit [Appellee] for all amounts due and owing her

> by [Appellee], first to all pre-petition and post-petition debts under the Deed of Trust to Secure Assumption, . . . and second to all pre-petition and post-petition child support arrears, . . . including all attorney's fees due and owing to [Appellant] pursuant to the child support lien filed on June 30, 2003, in the amount of $2,026.75 . . . all of which attorneys' fees are deemed additional child support.

(Instrument No. 2, Notebook 1, Exh 6).

The bankruptcy court relied on the clear and evident fact that the Agreed Order, which Appellant takes so much credit for, specifically provided for the payment of Appellant's fees. Appellant fails to recognize that her actions were limited to the Agreed Order accepted by the bankruptcy court on September 11, 2003, because its provisions specifically provided for Appellant's attorney's fees. *See In re Thornton*, 277 B.R. 719 (Bankr. E.D. Tex. 2002).

Moreover, throughout the hearings in the bankruptcy court, the court clearly intended to preserve comity and respect the decisions of the state court by taking action within its jurisdictional bounds. (Instrument No. 8, Notebook 7, Exh 17 at 7). As the bankruptcy court articulated in its opinion, the Agreed Order provided for Appellant's attorney's fees through the sale of Appellee's residence. Any collection efforts beyond what the bankruptcy court specifically approved in the Agreed Order pursuant to Appellee's pending

bankruptcy case directly violated the automatic stay, as well as the relief obtained by the lifting of the stay. The bankruptcy court clearly explained that its jurisdiction extended over the creditor, Appellant, and not the family court, (Instrument No. 2, Notebook 7, Exh 18 at 18) and ensured the protection of Appellant's attorney's fees before signing the Agreed Order. (Instrument No. 2, Notebook 3, Exh 48-H at 5). Therefore, this Court affirms the finding of the bankruptcy court.

2.

Appellant contends that the refusal of the bankruptcy court to review evidence in the family court, as well as the findings of the family judge in control of Appellee's incarceration was clear error at the time of trial. Appellant argues that the excluded documents[11] should have been considered on the issues of willfulness and bad faith on Appellant's part. The Court disagrees.

A court may take judicial notice of another court's judicial action. *Gray v. Beverly Enterprises-Mississippi, Inc.*, 390 F.3d 400, 408 (5th Cir. 2004). A court may not take judicial notice of the findings of fact of other courts, but "the fact that a judicial action was

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11. At the commencement of the trial, the bankruptcy court excluded defendant's exhibits two, three, four, twelve, thirteen, eighteen, and nineteen on the basis that the documents qualified as hearsay. (Instrument No. 8, Exh 1 at 22). These exhibits included of the Findings of Fact and Conclusions of Law as well as an Order of Sanctions resulting from proceedings in the family court.

taken is indisputable and therefore amenable to judicial notice." *Gray*, 390 F.3d 400, 408. *See also Taylor v. Charter Med. Corp.*, 162 F.3d 827, 831 (5th Cir. 1998).

The bankruptcy court determined the exhibits from the family court proceedings to be hearsay evidence. (Instrument No. 8, Exh. 1 at 22). Hearsay evidence is not admissible in trial court proceedings unless an exception to its exclusion applies. *See* Fed. R. Evid. 802. The bankruptcy court determined that it would take judicial notice of the fact that there were hearings in the family court, but that there would be no admission of any findings apart from the result of those hearings. (Instrument No. 8, Exh. 1 at 23). Furthermore, as stated previously, there was sufficient evidence before the court to determine whether Appellant's actions constituted a willful violation of the stay without resorting to an analysis of the family court's findings.

Appellant also contends that the bankruptcy court erred in relying upon evidence in its opinion which was not admitted in the trial. Specifically, Appellant argues that the bankruptcy court improperly relied upon a letter from the Harris County sheriff's office, which estimated Appellee's good time credit, in its determination of when Appellee's criminal contempt had expired.[12] The Court disagrees.

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12. The bankruptcy court decided that the hearsay status of the letter from the Sheriff's office would be determined whenever Appellee offered the exhibit into evidence during the trial, which never occurred. Here, Appellant references the bankruptcy court's opinion at page 6 where it begins its determination of the specific amount of damages. (Instrument No. 2, Notebook 3, Exh 63).

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The bankruptcy court did not rely on the letter from the Harris County sheriff's office to determine that Appellee's criminal contempt expired on September 23, 2003. Rather, the court simply references the letter to determine that September 23, 2003 was the date of Appellee's father's death and therefore determined the initial date from which damages could be calculated. Furthermore, because the bankruptcy court had proof that Appellant Young violated the stay as early as September 12, 2003, which would have subjected Appellant to increased damages, this Court finds no abuse of discretion in the bankruptcy court's reference of the letter.

3.

The Bankruptcy Code provides damages to an individual injured by a willful violation of the automatic stay. 11 U.S.C. § 362(k).[13] These damages include costs and attorneys' fees, as well as punitive damages in appropriate circumstances. *Id.*

Actual damages under 362(k) include damages for emotional distress. *Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999). A bankruptcy court may award damages attributed to emotional distress if a preponderance of the evidence shows that emotional harm occurred and that the defendant's conduct in

13. The bankruptcy court cites 11 U.S.C. §362(h) in its opinion. That particular section of the code has since been redesignated as 11 U.S.C. § 362(k) in an act on April 20, 2005, and will be referenced accordingly in this opinion.

willfully violating the stay was the cause of that harm. *Bishop v. US. Bank/Firstar Bank, N.A. (In re Bishop)*, 296 B.R. 890, 895 (Bankr. D. Ga. 2003). An award of damages for emotional distress due to a violation of the stay is appropriate where a natural and powerful emotional distress is readily apparent from the nature or extent of the wrongful conduct under the particular circumstances surrounding the stay violation. *In re Bishop*, at 895. Where a willful violation results in incarceration, loss of employment opportunities, and attorney's fees, an award for damages resulting from the circumstances will be awarded. *See In re Siskin*, 231 B.R. 514, 521 (Bankr. E.D.N.Y. 1999). A plaintiff is not required to mitigate damages where those damages could have been avoided without a stay violation. *See Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484 (N.D. Tex. 1999). In light of a willful violation of the automatic stay, an award of punitive damages is not an abuse of discretion by the bankruptcy court. *Id.* at 490.

Appellant Young argues that very recent authority addresses whether emotional damages are recoverable under § 362(k). *See US. v. Harchar*, 331 B.R. 720 (N.D. Ohio 2005) (holding that emotional injuries are not part of "actual damages" within the meaning of 11 U.S.C. § 362(h) because Congress had intended to provide for emotional distress damage recovery, the language in the provision would have been explicit). Appellant contends that in the absence of physical or psychological treatment for Appellee Repine's emotional distress, such damages cannot be awarded. Appellant continues her argument by stating that although Appellee is

correct that the Fifth Circuit has not addressed emotional damages under § 362(k), Appellee failed to address other authorities which require "more than hurt feelings, anger, and frustration to support an award of mental anguish." (Instrument No. 5 at 10). *See Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002). Plaintiff cites the language from *Salinas*, but fails to cite the context of the language or the complete quote. The court explains:

> We are careful when upholding emotional damage awards supported only by testimony of the plaintiff and a spouse, but we keep in mind our tradition of appellate review that commands strong deference to the jury and to the district judge who observed the testimony. "In certain cases a plaintiff's testimony alone may be sufficient proof of mental damages." *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (internal quotations and citations omitted). We also are mindful that "hurt feelings, anger and frustration are part of life . . . and [are] not the types of harm that could support a mental anguish award. Damages for emotional distress may be appropriate, however, where the plaintiff suffers sleeplessness, anxiety, stress, marital problems, and humiliation." *Id.* (internal quotations and citation omitted).

Salinas, 286 F.3d at 832.

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Appellant further contends that evidence of physical manifestations of emotional distress would "no doubt" be required by the Fifth Circuit. The Fifth Circuit's opinion with regard to emotional damages awards for a 362(k) claim would of course be very helpful, but there is enough authority from the Fifth Circuit in similar causes of action, such as in *Salinas.* There is also very recent authority from other bankruptcy courts within the Fifth Circuit which assists this Court in arriving at a conclusion in this case. *See also Gervin v. Cadles of Grassy Meadows II, LLC (In re Gervin)*, 337 B.R. 854, 858-60 (Bankr. W.D. Tex. 2005). By utilizing a three step analysis of Supreme Court and Fifth Circuit authority, and citing Fifth Circuit authority which holds that actual damages may include emotional and mental distress, the *Gervin* court persuasively holds that emotional distress damages may be recovered as a result of violation of a bankruptcy discharge.

Appellee clearly suffered emotional distress as a result of Appellant's conduct in that Appellee was prevented from attending the funeral of his father after having learned of his death on September 23, 2003. Appellant testified as to the stress, pain, and humiliation he experienced at having missed his father's funeral. (Instrument No. 8, Exh 2 at 135-137). The bankruptcy court did not abuse its discretion in awarding costs associated with Appellee's incarceration, because such lost income opportunity was especially feasible since Appellee was self-employed as a consultant. Furthermore, the bankruptcy court had previously advised Appellant that sanctions for an egregious stay

violation would be more than moderate, especially in light of the show cause hearing. (Instrument No. 2, Notebook 7, Exh 18 at 18, 20). Therefore, this Court affirms the bankruptcy court's award of damages to Appellee.

4.

Appellant admittedly does not challenge the reasonableness of the attorney's fees award, but the legal basis on which the award was found. Appellant argues that attorney's fees can only be awarded in a 362(k) claim when they have actually been paid. Appellant contends that there is no fee-shifting provision to 362(k) which would allow Appellee to be recompensed for the bill he has incurred. Appellant argues that the authority on which the bankruptcy court based its decision only allows attorney's fees not associated with the adversary itself. The Court disagrees.

The language of the Bankruptcy Code explicitly states, "an individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys's fees." 11 U.S.C. § 362(k)(1). Attorney's fees are recoverable actual damages under § 362(k). *See In re Roman*, 283 B.R. 1 (9th Cir. BAP 2002).

It is true that attorney's fees, standing alone with no evidence of actual damages, cannot be awarded. *See In re Martinez*, 281 B.R. 883, 886-87 (Bankr. W.D. Tex. 2002) (discussing that without actual damages as a result of the stay violation, a motion for sanctions should

not be brought). However, the bankruptcy court found that Appellee suffered actual damages, including attorney's fees, directly caused by Appellant's stay violation. Section 362(k) of the Bankruptcy Code provides for the attorney's fees for an individual injured by a stay violation. Also, the bankruptcy court adhered to standards established by precedent in this Circuit to determine the reasonableness of the attorney's fees. Accordingly, this Court finds no abuse of discretion in the attorney's fees finding, and affirms the bankruptcy court's award.

IV.

IT IS HEREBY ORDERED that the decision of the bankruptcy court finding Appellant Young in violation of the automatic stay, and awarding Appellee Repine actual damages including attorney's fees is **AFFIRMED**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 28th day of August, 2006, at Houston, Texas.

s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER ALLOWING ATTORNEYS FEES OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED DECEMBER 8, 2005

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CASE NO. 03-39455-H5-13

ADVERSARY NO. 04-3023

IN RE:

RONALD EUGENE REPINE

DEBTOR(S)

RONALD EUGENE REPINE

PLAINTIFF(S)

VS.

PATSY YOUNG

DEFENDANT(S)

ORDER ALLOWING ATTORNEYS FEES

Appendix C

Before the Court is the motion of Walker & Patterson for attorneys fees and the objection thereto of defendant Patsy Young.

Former Bankruptcy Code section 362(h) applicable to this case (now section 362(k)) provided:

> (h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362.

Walker & Patterson have demonstrated that debtor is entitled to recover $33,719.54 in attorneys fees which this Court finds were incurred by the debtor due to defendant's willful violation of the stay. The Court finds these attorneys fees are reasonable and necessary under the factors established under *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714 (5th Cir.1974) and *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1977).

Patsy Young objects to inclusion of the fees in a judgment as representing an unauthorized shift of the costs of litigation under the general rule that the parties to litigation are required to bear the burden of their own attorneys fees. Young suggests that the language of section 362 does not compare favorably to that of other fee shifting statutes and cannot be the basis for an

award of attorneys fees in favor of a debtor prevailing under that section. The Court rejects Young's contention and concludes that section 362(h) plainly provides for an award of attorneys fees in favor of a prevailing debtor injured by a willful violation of the stay. Damages incurred by debtor in litigating a willful violation of the stay are considered actual damages under the statute. *See e.g., In re Roman*, 283 B.R. 1 (9th Cir. BAP 2002).

Based on the foregoing, it is

ORDERED that the objection of Patsy Young to debtor's attorneys fees is **DENIED.**

Signed this 8 day of December, 2005, at Houston, Texas.

s/ Karen K. Brown
KAREN K. BROWN
CHIEF UNITED STATES
BANKRUPTCY JUDGE

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED AUGUST 12, 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 03-39455-H5-13

ADVERSARY NO. 04-3023

IN RE:

RONALD EUGENE REPINE

DEBTOR(S)

RONALD EUGENE REPINE

PLAINTIFF(S)

VS.

PATSY YOUNG

DEFENDANT(S)

MEMORANDUM OPINION

Before the Court is the complaint of Ronald Repine for damages and attorney fees for defendant Patsy Young's civil contempt and willful violation of the

automatic stay under 11 U.S.C. § 362(h). Trial of this matter was held during May 2005 and the facts established at trial comport with those recited by the 1st District Court of Appeals, Houston, Texas, in its opinion issued June 2, 2005, reversing and rendering a take nothing judgment as to Patsy Young's motion for sanctions pursued in the family court described in this matter. *See Greene v. Young,* 2005 WL 1308936 (Tex. App. –Hous. [1st Dist] June 2, 2005, not released for publication).

After due consideration , the Court finds that Patsy Young willfully violated the automatic stay in violation of 11 U.S.C. § 362.

I. Facts

Debtor and Elizabeth Anne Pollard-Repine have been engaged for some time in litigation in cause no. 2001-14946 pending in the 245th Judicial District Court of Harris County, Texas, concerning debtor's child support obligations. Patsy Young was counsel for Pollard-Repine in that litigation until replaced by Margaret McClure in the fall of 2003.

On June 26, 2003, the family court ordered debtor incarcerated for criminal contempt for failure to pay child support until December 22, 2003, subject to earlier release for "good time" credit awarded by the sheriff and subject to continued confinement for civil contempt until he had paid child support arrearages of $22,858.75 plus attorneys fees to Young of $2,026.75.

Appendix D

During his incarceration for criminal contempt, debtor filed a chapter 13 bankruptcy on July 1, 2003. Young received notice of the bankruptcy on July 22, 2003.

On September 11, 2003, this Court signed an Agreed Order Lifting Stay which: (1) allowed Pollard-Repine to exercise her state law rights in cause no. 2001-14946; (2) ordered debtor to execute a deed of his interest in certain residential real property to Pollard-Repine; and (3) provided for Pollard-Repine to credit the proceeds of a sale of that residence to various debts, including attorney's fees due Patsy Young with any remaining attorney's fees due Patsy Young to be provided for in debtor's chapter 13 plan.

On September 12, 2003, the family court heard a motion by debtor to suspend his incarceration. Elizabeth Pollard-Repine wanted debtor released from jail. Nevertheless, Young opposed debtor's release from jail unless she was paid a check for her fees despite her client's wishes. The family court denied the motion for suspension of commitment reciting that from June 26, 2003, through September 11, 2003, debtor had paid nothing toward the child support arrearage or on-going child support but he had paid or arranged to have some other person pay two attorneys to represent him during that time.

On September 23, 2003, debtor's father died. Debtor's counsel obtained a letter from the sheriff stating that debtor had received "good time" credit

toward his 180 day criminal contempt sentence and was eligible for release when his civil contempt sentence was complete. At that point, the debtor's counsels involved in the case worked toward preparing an agreed order securing debtor's immediate release so that debtor could attend his father's funeral. Nevertheless, Young demanded a certified check for payment of a portion of her fees before she would appear in family court to submit the agreed order.[1] Debtor and his counsel declined the condition.

The next day, September 24, 2003, debtor and Pollard-Repine jointly moved to enforce the agreed order lifting stay before the bankruptcy court and for additional relief seeking debtor's immediate release from incarceration. The Court ordered Young to show cause why she should not be held in contempt for violations of the automatic stay. This order lead to her arrest when she failed to appear at the hearing. After a hearing on September 29, 2003, Patsy Young was released. At that hearing, Judge Greendyke admonished Young to cease attempting to collect her debt from property of the estate.[2]

In October 2003, Young moved in family court to withdraw as counsel for Pollard-Repine and the family

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1. Young demanded to see a death certificate and urges she has not received one to date.

2. Young explained she refused to obey Judge Greendyke because although he told her not to continue her activities, he failed to "order" her to stop her activities.

court signed an order substituting Margaret McClure as counsel. Young also moved for sanctions in the family court against Mills, Greene, and McClure. On October 7, 2003, Young filed a motion to set aside the order substituting counsel. Ultimately, on November 6, 2003, debtor was released from confinement.

On March 18, 2004, the family court signed an order requiring Corey L. Mills, debtor's bankruptcy counsel, and Liza Greene to pay $5,000.00 each in monetary sanctions to Patsy Young, and to perform various acts concerning legal ethics. That order was reversed on appeal and judgment was rendered that Young take nothing.

II. Automatic Stay

Bankruptcy Code § 362(h) provides: "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." *Pettit v. Baker*, 876 F.2d 456 (5th Cir. 1989). A willful violation does not require a specific intent to violate the automatic stay. All that is required is knowledge of the existence of the stay and an intent to commit the act which violated the stay. *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210 (9th Cir. 2002); *Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265 (1st Cir. 1999). Knowledge of the bankruptcy is considered knowledge that there is an automatic stay in effect. *In re Lile*, 103 B.R. 830, 837 (Bankr. S.D. Tex. 1989), *aff'd* 161 B.R. 788 (S.D.Tex. 1993), *aff'd in part*, 43 F.3d 668 (5th Cir. 1994).

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Bankruptcy Code § 362(a) imposes an affirmative duty to discontinue post-petition collection actions. Sanctions may be imposed under § 362(h) for a willful violation of the automatic stay for maintaining an action and unjustifiably delaying its dismissal after receiving notice of the bankruptcy petition. *In re Dyer*, 322 F.3d 1178 (9th Cir. 2003); *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210 (9th Cir. 2002). In *In re Johnston*, 321 B.R. 262 (D.Ariz. 2005) the debtor's former wife and her attorney were found to have willfully violated the automatic stay by failing to take affirmative action to vacate an order of the family court which required the debtor to pay a large sum or face incarceration. An order lifting stay is limited to its terms and pursuit of activity beyond the terms of the order is a violation of the stay. *In re Thornburg*, 277 B.R. 719 (Banks. E.D.Tex. 2002) (agreed order lifting stay to allow ex-wife to pursue motion for enforcement in connection with state court divorce settlement held not to include filing abstract of judgment obtained or notice of lis pendens which violated the stay.)

Attorney's fees incurred in collection of child support are considered part of the child support award which, while non-dischargeable, nevertheless, constitute a claim under the Bankruptcy Code. Collection from property of the estate is stayed upon the filing of a bankruptcy. *See* 11 U.S.C. § 362(b)(2)(B). Thus, while debtor's incarceration for criminal contempt for failure to pay child support was not stayed by the filing of his bankruptcy, any attempts to collect such a prepetition claim from property of the estate violated the automatic stay.

Appendix D

III. Conclusion

The Court finds that Young repeatedly and intentionally sought payment of her prepetition attorneys fees from debtor without regard to whether there existed property that was not property of the estate from which he could pay them. To pursue post-petition collection of her fees from debtor or from property of the estate, Young needed to obtain relief from the automatic stay. Indeed, relief was obtained for payment of Young's fees from the sale of debtor's residence. Nevertheless, Young continued to seek collection of her fees from debtor directly and immediately. Young persisted in her pursuit of payment of her prepetition debt despite admonishment to discontinue her collection activity from the bankruptcy court and from the other attorneys involved in the case. The Court finds that Young committed a willful and egregious violation of the automatic stay and that debtor is entitled to actual and punitive sanctions including attorneys fees. *In re Atlantic Bus. & Community Dev. Corp.*, 901 F.2d 325, 328 (3rd Cir. 1990) (punitive damages appropriate where landlord in bad faith took affirmative steps to prevent access to estate property); *Goichman v. Bloom*, 875 F.2d 225, 228 (9th Cir. 1989)(punitive damages appropriate were creditor made numerous filings after being informed about stay violations); Restatement Second of Torts Sec. 908.

From September 23, 2003, the date of the death of his father, to November 6, 2003, debtor remained in jail despite the expiration of debtors' term for criminal

contempt. The repeated efforts of debtor's attorneys to obtain his release were unavailing in the face of Young's opposition and her adamant insistence on payment of her fees before agreeing to cooperate to obtain his release. The Court finds that debtor suffered actual damages in the amount of $100.00 per day for forty-four days totaling $4,400.00 for the emotional distress of being denied release to attend his father's funeral and to comfort his family and the loss of liberty of remaining in jail beyond his term for criminal contempt. *In re Siskin,* 231 B.R. 514 (Bankr.E.D.N.Y. 1999) (Debtor entitled to award of damages for creditor's willful violation of stay resulting in debtor's incarceration, loss of employment opportunities, and attorneys fees incurred to obtain release from jail.) The evidence shows that debtor suffered damages for lost potential consulting income in the amount of $520.00 per day for forty-four days totaling $22,880.00. *See Nissan Motor Acceptance Corp. v. Baker,* 239 B.R. 484 (N.D.Tex. 1999) (Award of actual and punitive damages for creditor's willful violation of the stay supported by the evidence held not abuse of discretion.) The Court further finds that debtor is entitled to punitive damages in the amount of $5,000.00. Debtor has also incurred attorneys fees to secure his release and maintain the present action the amount of which will be determined upon a subsequent hearing.

Based on the foregoing, counsel for debtor is **ORDERED** to file a fee application within twenty (20) days and a hearing is set on that matter for October 3, 2005 at 2:00 p.m. in Courtroom #403, at 515 Rusk St., Houston, Texas.

Appendix D

Signed this 12 day of August, 2005, at Houston, Texas.

s/ Karen K. Brown
KAREN K. BROWN
CHIEF UNITED STATES
BANKRUPTCY JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 18, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTHCIRCUIT

No. 06-20807

In Re: RONALD EUGENE REPINE

Debtor

PATSY YOUNG

Appellant

v.

RONALD EUGENE REPINE

Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 7/22/08, 5 Cir., _____, _____ F.3d _____)

Before REAVLEY, SMITH and GARZA, Circuit Judges.

Appendix E

PER CURIAM :

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT

s/ Emilio M. Garza
United States Circuit Judge

APPENDIX F — AGREED ORDER LIFTING STAY OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED SEPTEMBER 11, 2003

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

BANKRUPTCY CASE NO. 03-39455-H4-13

IN RE:

RONALD EUGENE REPINE,

DEBTOR

AGREED ORDER LIFTING STAY

Came on for consideration the Motion to Lift Stay of ELIZABETH ANNE POLLARD-REPINE, and the parties having announced that they have reached an agreement concerning the Motion, it is accordingly

ORDERED that the Automatic Stay under 11 U.S.C. § 362 is lifted for the purpose of allowing ELIZABETH ANNE POLLARD-REPINE to exercise her state law rights with respect to Cause No. 2001-14946, ***ELIZABETH ANNE POLLARD-REPINE v. RONALD EUGENE REPINE,*** pending in the 245th Judicial District Court of Harris County, Texas. Further, the parties agree and therefore it is ORDERED that

by September 12, 2003, RONALD EUGENE REPINE will execute a deed deeding 100% of all of his right, title and interest in the following property to ELIZABETH ANNE POLLARD-REPINE:

> Lot Forty-Three (43), in Block Eight (8), of OAKWOOD GLEN, Section Two (2), a subdivision in Harris County, Texas, according to the map or plat thereof, recorded in Volume 254, Page 16 of the Map Records of Harris County, Texas, more commonly known as 17910 Seven Pines, Spring, Texas 77379

It is further ORDERED that Debtor, RONALD EUGENE REPINE, may reside in said residence until it is sold, provided Debtor cooperates with ELIZABETH ANNE POLLARD-REPINE in good faith by allowing ELIZABETH ANNE POLLARD-REPINE to inspect the residence upon reasonable notice, and by not interfering with the sale of the residence; it is further

ORDERED that Debtor is to maintain the residence in good condition save and except normal wear and tear. Debtor is further ORDERED to restore all utilities (i.e., telephone, natural gas, electricity and water) at the residence no later than September 15, 2003, and keep them activated until the sale of the residence; it is further

ORDERED that beginning October 1, 2003, and each and every month thereafter, Debtor is to make all

mortgage payments timely to COUNTRYWIDE HOME LOANS, INC., until the sale of the residence; it is further

ORDERED that beginning November 1, 2003, and each and every month thereafter, Debtor is to make all required monthly child support payments as they become due.

ORDERED that at the time of sale, Debtor will vacate the property upon three (3) days notice from ELIZABETH ANNE POLLARD-REPINE or any subsequent purchaser without the necessity of Court intervention.

It is further ORDERED that from the sales proceeds, ELIZABETH ANNE POLLARD-REPINE shall extinguish the first lien debt to COUNTRYWIDE HOME LOANS, INC. and any ad valorem taxes that may be due and owing at the time of sale; and from the net sales proceeds ELIZABETH ANNE POLLARD-REPINE shall first reimburse herself for all reasonable and necessary repairs to the residence and provide an accounting of these expenses to the Chapter 13 Trustee within ten (10) days after closing; thereafter, from the remaining net sales proceeds, ELIZABETH ANNE POLLARD-REPINE shall credit Debtor for all amounts due and owing her by Debtor, first to all allowed pre-petition and post-petition debts under the Deed of Trust to Secure Assumption, including reasonable attorney's fees, due and owing up through and including the date of the closing on the sale, and second to all pre-petition

and post-petition child support arrears, including all pre-petition interest thereon, and including all attorney's fees due and owing to PATSY YOUNG pursuant to the child support lien filed on June 30, 2003, in the amount of $2,026.75, plus all remaining attorney's fees due and owing to her, and all attorney's fees due and owing to KATHLEEN VOSSLER in the amount of $462.50, all of which attorneys' fees are deemed additional child support; It is further

ORDERED that all amounts remaining due and owing to ELIZABETH ANNE POLLARD-REPINE under the Deed of Trust to Secure Assumption, the Child Support Lien, and for current child support, up to and including the date of closing on the sale, after applying the net sales proceeds as set out above, if any, shall be provided for in Debtor's Chapter 13 Plan of Reorganization. It is further

ORDERED that if there are amounts still due and owing that were subject of the Deed of Trust to Secure Assumption, those remaining amounts, including reasonable attorney's fees, will be provided for as a SECURED CLAIM in Debtor's Chapter 13 Plan; and if there are amounts still due and owing that were subject of the Child Support Lien, or were for post-petition child support arrears not subject to the Child Support Lien, those remaining amounts, including reasonable attorney's fees, due and owing to PATSY YOUNG and KATHLEEN VOSSLER as set out above, shall be provided for as PRIORITY UNSECURED CLAIMS in Debtor's Chapter 13 Plan. Upon notice of any deficiency,

Debtor will either amend or modify his Chapter 13 Plan within thirty (30) days. It is further

ORDERED that the Presiding Judge of the 245th Judicial District Court may cause the immediate release of Debtor, RONALD EUGENE REPINE, from the Harris County Jail after RONALD EUGENE REPINE appears in the 245th Judicial District Court and is sworn to reappear in the said 245th Judicial District Court for a minimum of four compliance dates to be set by the Honorable Judge of the 245th Judicial District Court of Harris County, Texas. It is further

ORDERED that on the compliance dates to be set by the Honorable Judge of the 245th Judicial District Court of Harris County, Texas, a hearing will be had to determine whether or not RONALD EUGENE REPINE is in compliance with his current child support obligations, whether or not RONALD EUGENE REPINE is in compliance with his payments under the Chapter 13 Plan for his child support arrears payments and whether or not he is in compliance with his payments under the Chapter 13 Plan for his payments towards attorneys' fees due and owing to PATSY YOUNG and KATHLEEN VOSSLER. It is further

ORDERED that if Debtor, RONALD EUGENE REPINE, is not in compliance with the Chapter 13 Plan for payment of current child support, child support arrearage payments, or payments of attorneys' fees due to PATSY YOUNG and KATHLEEN VOSSLER, the Honorable Judge of the 245th Judicial District Court of

Appendix F

Harris County, Texas, may issue further child support enforcement orders, including orders that may require incarceration.

SIGNED this 11 day of September, 2003.

s/ Karen K. Brown
UNITED STATES BANKRUPTCY JUDGE

APPROVED AND ENTRY REQUESTED:

s/ Margaret M. McClure
MARGARET M. MCCLURE
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909 Fannin, Suite 1580
Houston, Texas 77010
(713) 659-1333
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ATTORNEY FOR ELIZABETH ANNE POLLARD-REPINE

s/ Corey L. Mills
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(713) 463-6933
(713) 463-6934 (fax)

ATTORNEY FOR DEBTOR

Appendix F

MOVANT'S ATTORNEY HAS COMPLIED WITH
L.R. 4001

s/ Margaret M. McClure
MARGARET M. MCCLURE